90-1348

No. _____

Supreme Court, U.S.
FILED
FEB 25 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

IN RE: REVEREND ROBERT LEE BOND,

Petitioner

V.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.
DR. DWAIN MCDONALD, AND
MRS. DWAINE (JANE) MCDONALD,

Respondents.

PETITION FOR CERTIORARI

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, TX 75214
214-821-0220
TX Bar No. 05957750

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS VIOLATED WHEN THE APPEALS COURT HELD THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ARTICLE 5561h?

II. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS VIOLATED WHEN THE APPEALS COURT AFFIRMED THAT THE TRIAL COURT DID NOT ERROR IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS OF 1967 INTO EVIDENCE OVER OBJECTIONS OF HEARSAY, TIMELINESS OF OFFER OF THE RECORDS, RELEVANCY, AND A RULING EARLIER THAT THESE RECORDS WERE NOT DISCOVERABLE?

III. WERE REVEREND BOND'S 14TH AMENDMENT RIGHTS OF DUE PROCESS AND EQUAL PROTECTION VIOLATED WHEN THE APPEALS COURT AFFIRMED THAT THE TRIAL COURT DID NOT ERROR IN STRIKING DR. BOK'S EXPERT TESTIMONY REGARDING THE STANDARD OF CARE, AND REFUSED TO RULE ON RULE 13 SANCTIONS FOR THE DEFENDANT'S (ST. JOSEPH'S HOSPITAL) MAKING MISREPRESENTATIONS TO THE COURT THAT WERE MATERIAL TO REVEREND BOND'S CAUSES OF ACTION?

LIST OF ALL PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff/Appellant/Petitioner -

REVEREND ROBERT LEE BOND, represented by Bernard J. Dolenz, J.D., M.D.

Defendants/Appellees/Respondents -

ST. JOSEPH'S HOSPITAL, INC., represented by Richard Griffith.

DR. DWAIN MCDONALD, represented by Kleber C. Miller.

MRS. DWAIN (JANE) MCDONALD, represented by Kleber C. Miller.

DR. ROBERT COFFEY, represented by Estil Vance, Jr.

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OPINIONS BELOW

A take-nothing Judgment was entered on March 2, 1988 (T 125) with a timely appeal being perfected on May 18, 1988 (T 154).

This Judgment was challenged with 32 Points of Error; all of which were overruled by the Fort Worth Court of Appeals on June 5, 1990. (Appendix 3 - 10).

A Motion for Rehearing was overruled on July 24, 1990. (Appendix 11). The Supreme Court denied a Writ of Error with a notation "Writ denied" on October 17, 1990. (Appendix 12 - 13). The Supreme Court overruled a Motion for Rehearing on December 12, 1990. (Appendix 14 - 15).

The Decrees to be reviewed include the two points of error in the Appeal Opinion of June 5, 1990 and the subsequent rul-

ings of rehearing and denial of a Writ of Error.

JURISDICTION

This Court has jurisdiction pursuant to 28 USC Section 1651(a) for the review of all of the above appeal opinions, orders, and decisions.

STATUTES INVOLVED

These are in the Appendix and are:

Article 5561h - Confidentiality of mental health information of individual

Amendment XIV - U.S. Constitution

Texas Rule 13 - Effect of signing of pleadings, motions and other papers; sanctions

Texas Rule of Evidence, Rule 902(10)a

STATEMENT OF THE CASE

Reverend Bond, like 30% of the population, had chronic insomnia. This insomnia was refractory to treatment, and

finally a neuropharmacologist at Washington University at St. Louis placed him on Nardil, a medication which elevates tryptophane, which is now known to produce sleep. Nardil, an MAO inhibitor, is also used to treat depression.

Bond was Senior Pastor of the First Christian Church at Fort Worth, TX and experienced dizziness for which he sought treatment by Dr. McDonald, whose wife incidentally was also a Pastor at the same Church with Reverend Bond. Dr. McDonald, after learning that Reverend Bond had been on Nardil, referred him to Dr. Coffey. Both of these doctors independently breached medical and emotional confidences to a Church committee without WRITTEN CONSENT which caused Reverend Bond to be terminated. These doctors also prescribed an experimental and unreported drug combination (Deseryl and

Nardil), which produced a severe acute brain syndrome in Reverend Bond causing erratic cognitive thought processes and a hospitalization repleat with continuing negligent treatment, culminating in Reverend Bond being physically, emotionally, and financially injured to where he was "black-balled" from ever being a Pastor again. His wife has divorced him.

Reverend Bond contends that the Courts did not accord him equal rights pursuant to the 14th Amendment, and in violation of the Texas Statutes. No WRITTEN WAIVER was ever given to the doctors, and the doctors have never controverted this. Article 5561h mandates a WRITTEN WAIVER before health professionals can communicate to third parties about emotional problems of their patients. The Appeals Court, IN AN UNPUBLISHED OPINION, suggests that a VERBAL REQUEST does not

violate Article 5561h. There are other procedural irregularities that occurred during Reverend Bond's trial before the Honorable John Street, which were objected to, such as the admitting of Reverend Bond's medical records of 1967, and the striking of expert Dr. Bok, pursuant to misrepresentations made by St. Joseph's Hospital's attorney. Interestingly, Judge Street has been replaced by Judge Bruce Auld, who is the son-in-law of Reverend Bond.

JUDGMENT REVIEW - QUESTION I

POINT OF ERROR NO. 33

(PRESENTED IN SUPREME COURT MOTION FOR REHEARING)

THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION p. 21).

When Chief Justice Phillips discusses in the media that he abhors "judiciary legislation", one wonders what is happening when the Appeals Court in Fort Worth gives its opinion to the effect that a written waiver is not necessary when mental health information is communicated to third parties when this Supreme Court gives an opinion that a "writ denied", the apparent effect is to uphold this bit of judicial legislation by the Fort Worth Appeals Court.

If this Supreme Court believes that the Fort Worth Appeals Court is correct, it would seem that this Court should give notice to all of the emotionally disturbed patients in Texas and make a ruling that the provisions of Article 5561h and its progeny do not require a written waiver. While unpublished opin-

ions seem to have no precedential value, they nonetheless are published and are scrutinized by the Bar. It would be a travesty of justice to have this "sleeper" unpublished. I am sure that the Supreme Court, after reflecting upon this issue, will want to do something informative congruent with legislative intent and not allow the disclosure of confidential information or records regarding mental health without written permission.

Reverend Bond has been denied equal protection under the law as well as due process as is guaranteed by the 14th Amendment of the U.S. Constitution, and Article 1, Section 19 of the Texas Constitution, and Article 1, Section 3 of the Texas Constitution which states that "All free men ... have equal rights ... "

In this regard, Reverend Bond should have protection of the Mental Health Code

Statutes as well as Article 5561h and its progeny that require a written waiver before mental health information can be communicated to third parties. The Fort Worth Court of Appeals is trying to set aside this right and the Supreme Court seems to be giving its imprimator to the Fort Worth Court of Appeals. Furthermore, Reverend Bond has a statutory vested right in his causes of action that should not be changed by interpretation. LEVINE V. MISLLER, 231 NW 201, Wis 633; HARRIS V. PETERSON, 220 NW 174, 196 Wis 310.

JUDGMENT REVIEW - QUESTION II

REGARDING ADMISSION OF REVEREND BOND'S MEDICAL RECORDS OF ST. LUKE'S FROM 1967

POINT OF ERROR NO. 1

(BRIEF BEFORE FT. WORTH COURT OF APPEALS)

THE TRIAL COURT ERRED IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS INTO EVIDENCE (MCD EX 31; SF2374; 1864).

ARGUMENT AND AUTHORITIES

... a. HEARSAY

... hosital records to be admissible as an exception to the hearsay rule must comply with Rule 803(6) or Rule 902. Pursuant to 803(6), they must be introduced and authenticated by the custodian of records. Self authentication pursuant to Rule 902(10) requires that "such record or records along with such affidavits are filed with the Clerk of the

court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences ...

Neither Rule 803(6) nor Rule 902(10) were complied with, and the St. Luke's Hospital records were therefore improperly admitted ...

... c. PRIOR RULING OF THE COURT THAT SUCH RECORDS COULD NOT BE OBTAINED ...

... Here, medical records were not REASONABLY RELATED to the claimant's allegations and nor did the Defendant show good cause why they should not have produced these records within 30 (thirty) days as required by Rule 166b(h). Certainly, if the Defendants had any problem over the four (4) years of this litiga-

tion regarding medical records, they had ample time to come to this Court for a re-hearing regarding the medical records. This, they opted not to do, until after the Plaintiff had closed his case in chief, and the Defendants were well on their way to closing.

... d. TIMELINESS

This has been covered earlier, but the 30 (thirty) day rule under Rule 166b(h) and the 14 (fourteen) day rule, under Rule of Evidence 902(10) have not been complied with.

Prior acts by one of the parties are not admissible to prove that similar acts have reoccurred. In this regard, the introduction of the St. Luke's records was error under the "res inter alios acta" doctrine. "Res inter alios acta" doctrine provides that prior acts or

transactions by one of parties are not admissible to prove that similar acts have reoccurred; prior acts are thus incompetent evidence when offered for such purpose. FRANK B. HALL & CO., INC., V. BUCK, 678 S.W. 2d 612, ref. n.r.e, certiorari denied 105 S. Ct. 2704, 86 L. Ed. 2d 720.

POINT OF ERROR NO. 1

(SUPREME COURT MOTION FOR REHEARING)

THE TRIAL COURT ERRED IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS INTO EVIDENCE (MCD EX 31; SF2374; 1864).

Here, the Petitioner made objections of HEARSAY, RELEVANCY, PRIOR RULING OF THE COURT THAT SUCH RECORDS COULD NOT BE OBTAINED, AND TIMELINESS regarding the introduction of the St. Luke's medical record. The Respondents have used the "straw man" argument that the objections

were not specific enough and that Reverend Bond's "mental health" was at issue. The Petitioner contends that his objections were specific enough and that the main issues were false imprisonment and statutory violations involving breach of confidentiality and failure to advise him of his rights as promulgated by Articles 5547-24; 5547-86; 5547-25; 5547-70; 5547-71; and 5547-89.

Reverend Bond's "mental health" was not at issue as he described his problem as being one of insomnia and depression. Furthermore, the attorneys never defined "mental illness" to the patient. Furthermore, acute brain syndromes are due to disturbances in metabolic encephalopathy and accordingly are usually described as physical/neurological illnesses.

The Respondents distort the term "mental illness" and use it so loosely that

practically everyone, including most of the Justices on this Court, would fall into their "mental illness" category as there are metaphoric overtones.

As this Court knows, a witness may not be impeached by using an immaterial or collateral prior inconsistent statement. SPIRITAS V. ROBINOWITZ, 544 S.W. 2d 710 (Tex. Civ. App. - Dallas 1976 writ ref'd n.r.e). What the lawyers may have perceived as "mental illness" was never defined by them in their questions. What it may have meant was never clarified. Therefore, how can there be a predicate for proper impeachment.

ROBITSCHER, THE POWERS OF PSYCHIATRY, at 147 addresses some of this confusion:

"When a Judge or lawyer tiès to pin psychiatrists down on the definition of mental illness, he finds he has entered the labyrinth. The official glossary of the American Psychiatric Association, published in 1973, has no definition of

mental disease or mental illness, and it has only the most amorphous kind of definition of mental health. If you look up "mental illness" or "mental disease," you will be referred in each case to "mental disorder", but mental disorder is not defined. Instead there is a declaration that a mental disorder is anything that is included as a mental disorder in classification schemes of the World Health Organization and the American Psychiatric Association..." ROBITSCHER, THE POWERS OF PSYCHIATRY, 147.

In an interview with Dr. Thomas S. Szasz, quoted in 18 the New Physician 453 (1969):
Q: Dr. Szasz, what do you mean when you say that mental illness is a myth?

A: Disease means bodily disease. Gould's MEDICAL DICTIONARY defines disease as a disturbance of the function or structure of an organ or a party of the BODY. The mind (whatever IT is) is not an organ or a part of the BODY. Hence, it cannot be diseased in the same sense as the body can. When we speak of mental illness, then, we speak METAPHORICALLY. To say that a person's mind is sick is like saying that the economy is sick or that a joke is sick. When metaphor is mistaken for reality and then used for social purposes, then we have the making of myth. I hold that the concepts of mental health and mental illnesss are mythological concepts, used strategically to advance some social interests and to retard others, much as national and religious myths have been used in the past.

In the authoritative text Cecil TEXTBOOK OF MEDICINE, 17th Edition at 1985, the causes for acute brain syndrome are given and at 1974, the terms "delirium", "toxic psychosis" and "confusional state" are interchangeable with "metabolic encephalopahy". In the table on p. 1973, psychotropic drugs including lithium, phenathiazines (Thorazine), monoamine oxidase inhibitors (Nardil) are listed as causing metabolic brain disease which Reverend Bond received through the various negligent acts of the Defendants, when these Defendants made Bond seriously ill by experimenting with potent drugs.

Furthermore, Dr. Coffey indicated that Bond was normal after evaluating him, and before he even prescribed the Nardil/Deseryl combination. (SF 568-570).

As a diplomate of the American Board of

Neurology and Psychiatry, this attorney cannot find anything inconsistent with Reverend Bond's statements in the record regarding his emotional health as insomnia with concommitant depressive symptoms and a history of two acute brain syndromes (toxic deliriums/metabolic encephalopathy) are considered neurological disorders. To use the strawman argument of having "mental illness" without defining it is so loose that practically anyone living on this planet could be slotted into this category by any adversary to adversely prejudice his opponent.

The term "depression" is confusing as it may refer to a mood, a symptom or a syndrome. In Bond's case, his "depression" is a symptom and is reflective of a metabolic disorder wherein he needs an adequate amount of tryptrophane to sleep. This confusion is eluciated in EXHIBIT

"B" which is appended for the Court's benefit.

Therefore, the 20 year old medical records from St. Luke's should not have been admitted for both the legal reasons given earlier and for the medical reasons given now as there is no basis for impeachment. Furthermore, even if Reverend Bond had been "four plus crazy", his mental health was not on trial, and was not relevant. What was relevant was the negligences of the Defendants and the ruination of Bond's life as a professional with concommitant loss of his wife through divorce through incompetent medical practices of experimenting with incompatible drugs.

JUDGMENT REVIEW - QUESTION III
POINT OF ERROR NO. 6
(SUPREME COURT MOTION FOR REHEARING)

THE TRIAL COURT ERRED IN STRIKING DR. BOK'S EXPERT TESTIMONY REGARDING THE STANDARD OF CARE (T 26; T30; 1378-1393;1310, 1374; P EX 33).

Here, St. Joseph's uses the strawman argument that Dr. Bok did not supplement his deposition and that the only way that St. Joseph's fell below the standard of care was by not allowing Reverend Bond to use the telephone.

This is at odds with TR 30 regarding the Designation of Experts regarding Dr. Bok which states, "Dr. Bok will discuss standard of care as regards hospitals, psychiatrists, general practioners. He will also discuss the proper use of medications, tranquilizers. He will talk about experimental use of medications and the standards used in that protacol. He will discuss the Mental Health Code and

the rights that psychiatric patients have under the Mental Health Code. Dr. Bok's report has already been submitted. St. Joseph's as well as the other Defendants were placed on notice in Dr. Bok's report about what he would discuss. Dr. Bok did not supplement the deposition as he had no need to since what he gave in his live testimony was earlier noticed to the Defendants. St. Joseph's would have this Supreme Court believe that an expert should be limited to only his responses to the questions asked at deposition time. This spurious strawman argument by St. Joseph's flies in the face of the notice given to St. Joseph's in TR 30 as well as Dr. Bok's report. He changed no opinions, and St. Joseph's successfully torpedoed Dr. Bok's testimony by making misrepresentations to the Court for which Rev. Bond has sought Rule 215 sanctions.

In support of the misrepresentations to the Court by St. Joseph's and for Rule 13 and Rule 215 sanctions, portions of Dr. Bok's deposition have been attached to "Reply Brief for Appellant Reverend Robert Lee Bond", and are attached here as EXHIBIT "C".

It is bad enough for witnesses to make misrepresentations from the witness stand, but when lawyers make flagrant misrepresentations to the Court, one should be able to go beyond the record to show such egregious and disdainful conduct.

Accordingly, Dr. Bok's expert testimony regarding the standard of care should have remained since St. Joseph's had notice about his testimony and had his report. The Bok testimony shows that there was no inconsistency with the notice given to St. Joseph's about what he would testify.

ARGUMENTS FOR QUESTIONS I AND II

Reverend Bond contends that he was denied the equal protection of the laws in violation of Amendment XIV of the U.S. Constitution and Art. 1 Section 3a of the Texas State Constitution as the Courts did not protect his class, that is, a person who has emotional problems as promulgated by Art. 5561h which mandates that a WRITTEN WAIVER is necessary before health care professionals can communicate to third parties the emotional aspects of their patients. Rule of Evidence 510 is essentially the same as Art. 5561h and also applies. Additionally, the Trial Court and the Courts above did not respect his equal right protection regarding the admissibility of his medical records of St. Luke's Hospital as Rule of Evidence 902(10)a was not complied with because of inappropriate timing for its

production.

The Courts are bound by the 14th Amendment:

"The inhibitions of the Fourteenth Amendment include all the departments of state government, including not only the political, but also the judicial. Every state official, high and low, is bound by the Fourteenth Amendment. A similar scope is accorded to like state constitutional provisions. A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments".

16A Am Jur 2d, Section 742, p. 790.

The Fort Worth Court of Appeals, in its unpublished opinion, has changed the meaning of Art. 5561h by stating that an ORAL WAIVER does not violate THE WRITTEN WAIVER PROVISION of this statute. If an ORAL WAIVER were permissible, the legislature would not have any need to pass Art. 5561h or Tex. R. Evid. 510. Certainly, the emotionally ill of whatev-

er sort needs to know about this legislation in a PUBLISHED OPINION so that they can be on notice of the consequences so that their lives, too, will not be in peril as happened in the Bond case. Certainly, the record reflects that Bond was deprived of his equal protection clause of the 14th Amendment as he was denied the same protection of Art. 5561h as have been enjoyed by other persons in like circumstances. In TUMLINSON V. STATE (App 5 Dist. 1988) 668 S.W. 2d 539, review refused, the Court held that a waiver privilege of confidentiality MUST BE IN WRITING, even though the state contended that the Defendant waived the privilege of confidentiality by ORALLY AGREEING to a psychologist calling the police.

The law seems settled regarding the guarantee of equal protection which

apparently the Texas Judiciary has denied to Reverend Bond:

> ...It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty, and property, and in pursuit of happiness. It has frequently been stated that "the equal protection of the laws is a pledge of the protection of equal laws." There is also authority to the effect that it means equality of opportunity to all in like circumstances. And it has been said that equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances."

16A Am Jur 2d Section 737 p. 774.

ARGUMENT FOR QUESTION III

The due process rights of Reverend Bond were violated when the Trial Court, relying on misrepresentations of St. Joseph's Hospital's attorney, struck expert Dr. Bok's testimony. To make matters worse, St. Joseph's Hospital continued its brazen falsities in its

Brief to the Fort Worth Court of Appeals. In a reply Brief, Bond pointed out the falsities in at least 15 (fifteen) controverting points that were in the Bok's deposition. Furthermore, the transcript showed that Bok had covered more than just "not allowing Reverend Bond to make telephone calls". Sanctions were asked of the Appeals Court, including but not limited to Rule 13 and Rule 215, for these brazen falsities.

While excerpts of the deposition were not part of the record, attorneys should not be given licenses to lie and make misrepresentations to the Court that cause grievous and harmful error. It would seem that the Courts would want to know about the truth more than whether every procedure was followed. The truth is something hard to get some people to listen to and harder to get them to believe.

While truth is not always popular, it is always right. Attorneys should not use word-smithing as a smoke screen to obscure the truth, but rather should use words as a search light to reveal the truth.

In this case, while the truth does not die about St. Joseph's misrepresentations, Reverend Bond has been "paralyzed" by the Appeals Court and the Supreme Court in failing to address this complaint in their opinions. It would seem that the Court would be more interested in getting the truth and not prejudice a party's case when the truth is brought to the Court's attention. Here, Reverend Bond's substantive and due process rights guaranteed him under the 14th Amendment were violated because of the silence of the Courts.

Furthermore, the Texas State Constitu-

tion, Article 1, Section 13, states: "All courts shall be open and every person or an injury done him, in his lands, goods, person or reputation, shall have remedy the due course of law". Here, Reverend Bond has been harmed by St. Joseph's misrepresentations, and yet the Courts have not given him an opportunity for the injury done him in violation of this constitutional prohibition.

At the very least, Reverend Bond contends that he should be given a new trial before an impartial Judge and allow his expert give unfettered testimony so that a proper conclusion can be made from the evidence regarding the truth:

> ... To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence, a conclusion from the evidence of where the truth lies, the application of the appropriate laws to the facts found, and the rendition of judgment accordingly ...

16A Am Jur 2d Section 846 p. 1058

CONCLUSION

The Petitioner Reverend Bond prays that this Honorable Court review this Petition for Certiorari, and that upon such review find that Reverend Bond's 14th Amendment rights of due process and equal protection were violated, that this Honorable Court reverse the Judgment of the Courts below, and remand this cause for trial before a fair and impartial Judge, consistent with the opinions of this Court, award Petitioner costs of Court, and grant appropriate sanctions against St. Joseph's Hospital for its misrepresentations, and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.
Diplomate Am. Board of
Neurology and Psychiatry

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing instrument have been sent by regular mail on this the ____ day of February, 1991 to Kleber Miller, Estil Vance, Jr. and Richard Griffith.

Bernard J. Dolenz

90-1348 (4)

FILED
FEB 25 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

IN RE: REVEREND ROBERT LEE BOND,

Petitioner

V.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.
DR. DWAIN MCDONALD, AND
MRS. DWAINE (JANE) MCDONALD,

Respondents.

APPENDIX

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June 5, 1990

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RE: CASE NO. 02-88-00095-CV

STYLE: Bond, Rev. Robert L.
V: St. Joseph Hosp., Dr. Dwain McDonald, Rev. Jane McDonald, et al

The judgment of the trial court in the above case was affirmed today.

A copy of this Court't opinion and judgment are hereto attached.

Respectfully yours,

YVONNE PALMER, CLERK

By _____
Deputy

LETPR.07ds

NO. 2-88-095-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

REVEREND ROBERT LEE BOND APPELLANT

VS.

ST. JOSEPH'S HOSPITAL, DR. DWAIN MCDONALD, REVEREND JANE MCDONALD, AND DR. ROBERT COFFEY APPELLEES

FROM THE 352ND DISTRICT COURT
OF TARRANT COUNTY

OPINION

This is an appeal by Reverend Robert Lee Bond from a take-nothing judgment in favor of appellees, St. Joseph's Hospital, Dr. Dwain McDonald, Reverend Jane McDonald, and Dr. Robert Coffey, in appellant's suit alleging negligence, breach of confidentiality, false imprisonment, assault and battery, and negligence per se in violation of certain statutes. Appellant's thirty-two points of error present issues of erroneous

admission and exclusion of evidence, disallowance of trial amendments, failure to submit jury instructions, submission of jury instructions and special issues, limiting of time for jury argument, failure to grant a directed verdict, failure to permit jury voir dire into insurance industry related matters, and legal and factual sufficiency of evidence. ...

... As we view the objection (the admission into evidence of Bond's medical records of surgery and treatment at St. Luke's in 1967), it directed the trial court's attention to:

1. Relevancy of that portion of the records dealing with the gallbladder problem.

2. Hearsay nature of the records.

3. The records had previously been held,

by another judge, to be undiscoverable.

4. Timeliness of the offer of the records.

Additional grounds of inadmissibility, not presented to the trial court are urged in this appeal but will not be addressed, as they present nothing for review. DRAKE V. STATE, 488 S.W. 2d 534, 538 (Tex. Civ. App. - Dallas 1972, writ ref'd n.r.e.). As to relevancy of the records, we observe that appellant had previously testified as to his gallbladder surgery, followed by the episode of brain syndrome thus providing the relevancy of medical records of that hospitalization. Furthermore, the records of the episode following surgery were admissible to rebut appellant's assertion that he had never been diagnosed as having any kind of mental illness. As to the hear-

say objection, the record shows that the medical records were accompanied by an affidavit attesting to their accuracy and to their status as business records under the purview of TEX. R. CIV. EVID. 803(6), 902(10). Considering the objection that another judge had previously ruled on discoverability or admissibility of the medical records, we are provided no record reference nor citation of controlling authority in support of such contention, thus the objection is waived. SEE WOLF V. FERNANDEZ, 733 S.W. 2d 695, 697 (Tex. App. - San Antonio 1987, writ ref'd n.r.e.); REUBEN H. DONNELLEY CORP. V. MCKINNON, 668 S.W. 2d 612, 617 (Tex. App. - Corpus Christie 1985, writ ref'd n.r.e.). The same may be said, upon the timeliness of the objection. Point of error one is overruled.

Point of error twenty-three attempts to assign error to the submission of jury questions 11, 12, 13, 14, 15, 16, 17, and 18. In spite of the multiplicity of this point, we can discern the contention that the issues of waiver and estoppel regarding appellant's right to confidentiality embraced in those jury questions were improperly submitted, because such defenses are not available to defeat requirements of TEX. REV. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1990) regarding confidentiality of mental health information.

The statute provides for confidentiality of communication between a patient/client and a professional, and also confidentiality of records of identity, diagnosis, evaluation, or treatment. The confidential matters shall not be disclosed except under

special circumstances, none of which exist in this case. Jury questions 11 and 15 inquire as to appellees, "Was any disclosure of information ... relating to the medical health condition of Plaintiff ... made at the request of Plaintiff?", to both of which the jury answered affirmatively. Questions 12, 13, 14, 16, 17 and 18 inquiring of waiver and estoppel were conditioned upon negative answers to 11 and 15, which applied to Dr. Coffey and Dr. McDonald respectively. Appellant argues that the statute requires a written waiver of disclosure, so that a request by the patient would not excuse the disclosure unless the request was made in writing. The language of the statute is:

> (b) Exceptions to the privilege of confidentiality, in other than court proceedings, allowing disclosure of confidential information by a professional, exist only to the following:
>
> (4) to any person bearing the

written consent of the patient/client... TEX. CIV. STAT. ANN. art. 5561h (Vernon Supp. 1990).

Appellant presents no argument, nor does he cite authority for the proposition that the above language excludes a lawful authorization to disclose by means of a verbal request of the patient. WE HOLD THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. Additionally, appellant argues under this point that the submission of the conditional questions inquiring of waiver and estoppel constituted a comment on the weight of the evidence because they suggested there were defenses to the statute and that the "statute did not give exceptions of waiver or estoppel." No argument is made

or authority cited as to why the defenses of waiver or estoppel do not apply to the enforcement of a right given by statute, and we know of no reason. Point of error twenty-three is overruled. (Emp. added). ....

Judgment affirmed.

JOE SPURLOCK II
JUSTICE

PANEL A
WEAVER, C.J.; SPURLOCK II, AND LATTIMORE, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(e)
JUNE 05 1990

COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

Rev. Robert L. Bond)

vs.) No.2-88-095-CV

St. Joseph's Hospital, et al.

ORDER

On this day came on to be considered appellant's motion for rehearing.

It is the opinion of this Court that said motion should be and is hereby OVERRULED. It is the order of this Court that the opinion and judgment of June 5, 1990, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 24th day of July, 1990.

H. TOD WEAVER
CHIEF JUSTICE

OVRULE.CVmj

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 17, 1990

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Dallas, TX 75214

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RE: Case No. D-0238

Style: REVEREND ROBERT LEE BOND
V. ST. JOSEPH'S HOSPITAL, INC., ROBERT COFFEY, M.D., DR. DWAIN MCDONALD & MRS. DWAINE (JANE) MCDONALD

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by_____
Courtland Crocker, Deputy

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 12, 1990

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RE: Case No. D-0238
Style: REVEREND ROBERT LEE BOND
V. ST. JOSEPH'S HOSPITAL, INC., ROBERT COFFEY, M.D., DR. DWAIN MCDONALD & MRS. DWAINE (JANE) MCDONALD

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

Art. 5561h. Confidentiality of mental health information of individual.

DEFINITIONS OF THIS ACT

Section 1. (a) "Professional" means any person authorized to practice medicine in any state or nation, or any person licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, or reasonably believed by the patient/client so to be.

(b) "Patient/Client" means any person who consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and other drug addiction.

CONFIDENTIALITY OF INFORMATION

Sec. 2. (a) Communication between a patient/client and a professional is confidential and shall not be disclosed except as provided in Section 4 of this Act.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient/client which are created or maintained by a professional are confidential and shall not be disclosed except as provided in Section 4 of this Act. Nothing in this section shall prohibit the disclosure of information necessary in the collection of fees for mental or emotional health services, as provided by Subsection (b)(5) of Section 4 of this Act.

(c) Any person who receives information from confidential communications or

records as defined by Section 2, other than the persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's client's behalf, shall not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this Act continue to apply to confidential communications or records concerning any patient/client irrespective of when the patient/client received services of a professional.

PRIVILEGE OF CONFIDENTIALITY

Sec. 3 (a) The privilege of confidentiality may be claimed by the patient/client or by other persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's/client's behalf.

(b) The professional may claim the privilege of confidentiality but only on behalf of the patient/client. the authority to do so is presumed in the absence of evidence to the contrary.

EXCEPTIONS TO THE PRIVILEGE
OF CONFIDENTIALITY

Sec. 4 (a) Exceptions to the privilege in court proceedings exist:

(1) when the proceedings are brought by the patient/client against a professional, including but not limited to malpractice proceedings, and in any criminal or license revocation proceedings in which the patient/client is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient/client waives his

right in writing to the privilege of confidentiality of any information, or when other persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's/client's behalf submit a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient/client;

(4) when the judge finds that the patient/client after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's/client's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involv-

ing the patient's/client's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure; or

(5) in any criminal prosecution where the patient is a victim, witness, or defendant. Records are not discoverable until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion thereof. Such determination shall not constitute a determination as to the admissibility of such records or communications or any portion thereof.

(b) Exceptions to the privilege of confidentiality, in other than court

proceedings, allowing disclosure of confidential information by a professional, exist only to the following:

(1) to governmental agencies where such disclosures are required or authorized by law;

(2) to medical or law enforcement personnel where the professional determines that there is a probability of imminent physical injury by the patient/client to himself or to others, or where there is a probability of immediate mental or emotional injury to the patient/client;

(3) to qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, but such personnel may not identify, directly or indirectly, a patient/client in any report of such research, audit, or evaluation, or otherwise disclose identi-

ties in any manner;

(4) to any person bearing the written consent of the patient/client, or a parent if the patient/client is a minor, or a guardian if the patient/client has been adjudicated incompetent to manage his personal affairs, or to the patient's/client's personal representative if the patient/client is deceased;

(5) to individuals, corporations, or governmental agencies involved in the payment or collection of fees for mental or emotional health services performed by a professional as defined in Section 1 of this Act.;

(6) to other professionals and personnel under the direction of the professional who are participating in the diagnosis, evaluation, or treatment of the patient/client; or

(7) in any official legislative inquiry regarding state hospitals or state school, provided that no information or records which identify a patient/client shall be released for any purpose unless proper consent to the release is given by the patient/client, and only records created by the state hospital or school or its employees shall be included under this subsection.

AMENDMENT XIV - U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 13. EFFECT OF SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their

knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose sanctions available under Rule 215-2b, upon the person who signed it, a represented party, or both ...

(10) BUSINESS RECORDS ACCOMPANIED BY AFFIDAVIT.

a. Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) of (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and pro-

vided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause.

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

(2)

No. 90-1343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE: REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents.*

On Writ of Certiorari
To The Court of Appeals of Texas
Second Court of Appeals District
Fort Worth, Texas

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Respondents St. Joseph Hospital, Inc. and Robert Coffey, M.D.

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Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

BEST AVAILABLE COPY

I. RESPONSE TO QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Reverend Robert Lee Bond v. St. Joseph Hospital, Inc., Robert Coffey, M.D., Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald*, (Opinion Unpublished), violate Bond's rights under the Fourteenth Amendment because it overruled points of error challenging rulings of the trial court on evidentiary points under Texas law.

II. LIST OF ALL PARTIES

The following are parties to this case:

Reverend Robert Lee Bond
Dr. Dwain McDonald
Mrs. Dwain (Jane) McDonald
Dr. Robert Coffey
St. Joseph Hospital, Inc.

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No. 90-1343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE: REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents.*

On Writ of Certiorari
To The Court of Appeals of Texas
Second Court of Appeals District
Fort Worth, Texas

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Respondents St. Joseph Hospital, Inc. and Robert Coffey, M.D.

V. OPINIONS AND ORDERS BELOW

Bond submitted an Appendix to the Petition for Writ of Certiorari which sets forth a portion of the unpublished opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, *Bond v. St. Joseph Hospital, Inc. et al* (Tex. App.-Fort Worth 1990, writ denied); denial of review by the Supreme Court of Texas and denial of Bond's motion for rehearing

of the application for writ of error (*See*, Appendix to Petition for Writ of Certiorari p. 1-5). Bond failed to raise a constitutional challenge in any of the assignments of error presented to the courts below. A copy of the Assignments of Error presented to the Court of Appeals for the Second Supreme Judicial District and the Supreme Court of Texas is reprinted at Appendix "A" and "B," respectively, to the subject Response.

VI. OBJECTIONS TO JURISDICTION

1. Title 28 U.S.C. § 1651(a) does not confer jurisdiction.

Bond seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1651(a) which provides:

> (a) The Supreme Court and all courts established by acts of Congress may issue all writs necessary or appropriate **in aid of their respective jurisdictions** and agreeable to the usages and principles of law. [Emphasis added].

Clearly, the power to issue writs is predicated upon a finding of jurisdiction.

Rule 10 of the Rules of the Supreme Court indicate the "character of reasons" that will be considered in granting or denying a petition for certiorari to review state court decisions.

> Rule 10. Considerations Governing Review on Writ of Certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while

neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

* * *

(b) when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) when a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable divisions of this Court.

* * *

Bond does not submit which ground is applicable to his petition because none of the grounds apply.

Rule 14(h) of the Supreme Court Rules provides the procedure for verifying that the ground(s) were presented to the court below:

h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion

> of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

The Petition which summarizes the state court proceedings and the assignments of error presented to the state courts lack the prescribed references and specifications. (See Appendix "A" and "B", hereto.) It is facially insufficient to show any reason to invoke the Court's discretionary review on any ground within the letter or spirit of either Rule 10 or Rule 14 of the Supreme Court Rules. It contains not the slightest intimation that Texas courts have decided any federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals; or that the Texas court has decided any question of federal law at all, let alone an important one. (See Appendix "A" and "B", hereto.)

Bond therefore has failed to raise issues which would properly be before the Court if certiorari were granted.

VII. ARGUMENT

Bond submitted thirty-two points of error to the Court of Appeals, which were overruled, and thirty-four points to the Supreme Court on an Application for Writ of Error, which was denied. None of the points urged that Bond was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, nor did he present any other Constitutional challenge or federal question.

The effort to concoct Constitutional issues from evidentiary questions of state law is transparent and groundless. The opinion and holding below address nothing more than (1) the admission and exclusion of evidence by application of state rules of evidence, and (2) the refusal of the Texas Court of Appeals for the Second Supreme Judicial District to rule on Bond's Motion for Sanctions against St. Joseph Hospital under Rule 13 of the Texas Rules of Civil Procedure.

The subject application for Writ of Certiorari purports to challenge state court rulings on three assignments of error presented to the state courts, none of which presented constitutional issues.

Question No. I addresses Point of Error No. 33, which was not presented to the Court of Appeals but was presented for the first time to the Texas Supreme Court in the Application for Writ of Error. (See Appendix "A" and "B", hereto.) The point was, therefore, waived.

Question No. II addresses Point of Error No. 1, which was submitted to the Fort Worth Court of Appeals and challenged the admission of Bond's medical records over the objections of relevance, hearsay, and timeliness, as well as other grounds which were not presented to the trial court, and which therefore were not reviewed. The point was overruled by the application of Rule 803 (6) and 902 (10) of the Texas Rules of Civil Evidence.

Question No. III addresses Point of Error No. 6 which was submitted to the Texas Court of Appeals and which complained that the court disallowed certain expert testimony regarding standard of care. The Court of Appeals

found that it was error to strike the testimony, but that Bond failed to show that it was harmful error.

Rule 13 of the Texas Rules of Civil Procedure provides that sanctions may be imposed by the trial court against counsel in certain instances. Bond never asked the trial court for any type of relief under Rule 13. There was no ruling for a higher court to review.

The subject Petition is not deserving of consideration for review. There is no reason for this Court to ignore its own strictures to the bar that "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227; 69 L.Ed. 925; 45 S. Ct. 496; 1 U.S.T.C.P. 134; 5 AFTR 5385 (1925). *See Houston Oil Co. v. Goodrich*, 245 U.S. 440; 62 L.Ed. 385; 38 S. Ct. 140 (1918); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508; 68 L.Ed. 413, 44 S. Ct. 164 (1924); and *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178; 82 L.Ed. 1273; 58 S. Ct. 849 (1938). See also the remarks of Chief Justice Taft, in 35 Yale L.J. 1, 3-4; Chief Justice Hughes, in 20 A.B.A.J. 341; and Chief Justice Vinson, in 69 S. Ct. V, VI-VII.

The Petition is frivolous and should be denied.

VIII. PRAYER

Wherefore, St. Joseph Hospital and Robert Coffey, M.D. pray that this Court deny Bond's Petition for Writ of Certiorari and, alternatively, that this Court affirm the judgment of the Court of Appeals. St. Joseph Hospital and Robert Coffey, M.D. further pray that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,

By: _____

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Counsel of Record
for Respondents

RICHARD L. GRIFFITH
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Additional Counsel
for Respondents

CERTIFICATE OF SERVICE

This hereby certifies that a true and correct copy of the foregoing instrument was mailed, certified mail, return receipt requested, to Mr. Bernard J. Dolenz, J.D., M.D., 6102 Swiss Avenue, Dallas, Texas 75214, Attorney for Petitioner, Reverend Robert Lee Boul, and Mr. Kleber C. Miller, Shannon, Gracey, Ratliff & Miller, 2200 First City Bank Tower, 201 Main Street, Fort Worth, Texas 76102, Attorney for Appellee, Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald on the _____ day of March, 1991.

EVELYN R. LEOPOLD

APPENDIX A

IN THE
COURT OF APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
AT FORT WORTH
NO. 2-88-095-CV

REVEREND ROBERT LEE BOND, *Appellant*,
v.
ST. JOSEPH'S HOSPITAL, ET AL., *Appellees*.

PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff-Appellant
REVEREND ROBERT LEE BOND

Defendants-Appellees
ST. JOSEPH'S HOSPITAL, INC.
DR. DWAIN MCDONALD
MRS. DWAIN (JANE) MCDONALD
DR. ROBERT COFFEY

REQUEST FOR ORAL ARGUMENT

Because appellant is of the opinion that oral argument will be of help to this Court in resolving the legal issues involved in this appeal, appellant, pursuant to Rule 75(f) files this request for oral argument.

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THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents*

Appealed from the 352nd Judicial District
Court and from the Second Supreme
Judicial District of Texas
No. 2-88-095-CV
of Tarrant County, Texas

WRIT OF ERROR

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, TX 75214
214-821-0220
Tx Bar No. 05957750

ATTORNEY FOR
PETITIONER

NAMES OF ALL PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff-Appellant/Petitioner
REVEREND ROBERT LEE BOND

Defendants-Appellees/Respondents
ST. JOSEPH'S HOSPITAL, INC.
DR. DWAIN McDONALD
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Because Appellant is of the opinion that oral argument will be of help to this Court in resolving the legal issues involved in this appeal, Appellant, pursuant to Rule 75 (f) files this request for oral argument.

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NO. 33: THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION P. 21).

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(3)

No. 90-1343

Supreme Court, U.S.
FILED
APR 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

REVEREND ROBERT LEE BOND,

Petitioner,

v.

ST. JOSEPH HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, AND
MRS. DWAIN (JANE) McDONALD,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Second Supreme Judicial District Of Texas At Forth Worth

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS, DR. DWAIN McDONALD AND MRS. DWAIN (JANE) McDONALD

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OR CALL COLLECT (402) 342-2831

RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Whether the holding of the Court of Appeals of Texas, Second Supreme Judicial District, Fort Worth, Texas, in No. 2-88-095-CV styled, *Reverend Robert Lee Bond v. St. Joseph Hospital, Inc., Robert Coffey, M.D., Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald* (opinion unpublished), violates Bond's rights under the Fourteenth Amendment because it overruled points of error challenging the rulings of the trial court on evidentiary points under Texas law.

LIST OF ALL PARTIES

The following are parties to this case:

Reverend Robert Lee Bond, Petitioner
Dr. Dwain McDonald, Respondent
Mrs. Dwain (Jane) McDonald, Respondent
St. Joseph Hospital, Inc., Respondent
Robert Coffey, M.D., Respondent

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STATEMENT OF THE CASE

Respondents, Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald ("the McDonalds"), disagree with Petitioner's statement of the case to the extent that it alleges the McDonalds breached "medical and emotional confidences" causing Petitioner to be terminated as senior pastor of First Christian Church at Fort Worth, Texas. The McDonalds further disagree with Petitioner's contention that Dr. Dwain McDonald prescribed a drug to Petitioner which injured Petitioner. Neither the evidence nor the jury findings in the trial court support these contentions.

REASONS FOR DENYING THE WRIT

This case is entirely unworthy of review by this honorable Supreme Court. First, the case should be disposed of without review for failure to raise the constitutional issues in the courts below. Second, the Petition for Writ of Certiorari does not raise a federal question appropriate for review. Even assuming the appeals court was wrong in overruling Petitioner's points of error under Texas state law, the erroneous ruling would not create a federal constitutional question.

I. THE FOURTEENTH AMENDMENT CLAIMS WERE NOT RAISED BELOW AND THEREFORE CANNOT BE CONSIDERED HERE.

Petitioner submitted an appendix to the Petition for Writ of Certiorari which sets forth a portion of the unpublished opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, No.

2-88-095-CV, *Bond v. St. Joseph Hospital, Inc., et al* (Tex. App. – Fort Worth 1990, writ denied); denial of review by the Supreme Court of Texas and denial of Petitioner's Motion for Rehearing of the Application for Writ of Error to the Supreme Court of Texas. (*See* Appendix to Petition for Writ of Certiorari at 1-5). The appendix demonstrates that Petitioner failed to raise his constitutional challenge in any of the assignments of error presented to the courts below. A copy of the assignments of error presented to the Court of Appeals for the Second Supreme Judicial District and the Supreme Court of Texas are reprinted at Appendices "A" and "B", respectively, to this brief.

Petitioner's failure to assert his constitutional arguments in the courts below precludes review by this Court. It is the long-standing rule of this Court that review of a final judgment of a state court may only be had if the record reflects, either expressly or by clear implication, that the federal question was pressed or passed upon below. *E.g., Webb v. Webb*, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 1892, 68 L. Ed. 2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-163, 22 L. Ed. 2d 398 (1969). This rule requires that there be no doubt from the record that the state courts were apprised of the nature and substance of the federal claim in accordance with the time and manner prescribed by state law. *Webb v. Webb*, 451 U.S. at 501, 101 S. Ct. at 1894, 68 L. Ed. 2d 392. Texas follows the general rule that issues, including constitutional ones, raised for the first time on appeal are waived. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 856 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.). Petitioner asserted that his Fourteenth

Amendment rights to equal protection and due process had been violated for the first time in his Petition for Writ of Certiorari to this Court. As a result, there is no occasion for certiorari review here.

II. PETITIONER'S FOURTEENTH AMENDMENT CLAIMS DO NOT RAISE A FEDERAL QUESTION APPROPRIATE FOR REVIEW.

Petitioner asserts that the holding of the state appellate court denied him equal protection and due process. Even assuming for the purpose of this brief that the state court was wrong in its decision regarding the disclosure of confidential information, this would not create a constitutional basis for challenging the decision. This point was clearly made by this Court in *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907), where the Court said:

> The decision of a [state] court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong. . . .

Id. at 461, 27 S. Ct. at 557, 51 L. Ed. 879. More recently, in *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 2d 1683 (1948), this Court observed:

> We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Id. at 731, 68 S. Ct. at 1258, 92 L. Ed. 2d 1683; *see also Wainwright v. Goode*, 464 U.S. 78, 86, 104 S. Ct. 378, 383, 78 Ed. 2d 187 (1983).

Petitioner has not alleged here that the process by which the Texas appeals court decision was made was inconsistent with the requirements of due process or equal protection. Accordingly, Petitioner's objection to the state court's application of state law does not give rise to a constitutional claim. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6, 100 S. Ct. 2138, 2141 n.6, 65 L. Ed. 2d 106 (1980).

CONCLUSION AND PRAYER

The McDonalds respectfully maintain that the Petitioner's constitutional claims were waived below and, therefore, cannot be heard here. In any event, the Petitioner's complaints with respect to the state appeals court application of state law to the specific facts of this case does not give rise to a constitutional claim which is capable or worthy of review. The McDonalds, therefore, request that the Petition for Writ of Certiorari be denied, and, alternatively, that this Court affirm the judgment of the court of appeals. The McDonalds further pray that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,

By: _____
John Hill Cayce, Jr.

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Additional Counsel for Respondents, Dr. Duain McDonald And Mrs. Duain (Jane) McDonald

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was mailed, certified mail, return receipt requested to Bernard J. Dolenz, J.D., M.D., 6102 Swiss Avenue, Dallas, Texas 75214, Attorney for Petitioner, Reverend Robert Lee Bond, and to Ms. Evelyn R. Leopold, Cantey & Hanger, 801 Cherry Street, Suite 2100, Forth Worth, Texas 76102, Attorney for Respondents, St. Joseph Hospital, Inc., and Robert Coffey, M.D., on the 4th day of April, 1991.

_____

John Hill Cayce, Jr.

APPENDIX A

IN THE
COURT OF APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
AT FORT WORTH
NO. 2-88-095-CV

REVEREND ROBERT LEE BOND, *Appellant*,
v.
ST. JOSEPH'S HOSPITAL, ET AL, *Appellees*.

PARTIES

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DR. DWAIN MCDONALD
MRS. DWAIN (JANE) MCDONALD
DR. ROBERT COFFEY

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APPENDIX B

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Appealed from the 352nd Judicial District
Court and from the Second Supreme
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No. 2-88-095-CV
of Tarrant County, Texas

WRIT OF ERROR

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MRS. DWAIN (JANE) McDONALD
DR. ROBERT COFFEY

REQUEST FOR ORAL ARGUMENT

Because Appellant is of the opinion that oral argument will be of help to this Court in resolving the legal issues involved in this appeal, Appellant, pursuant to Rule 75(f) files this request for oral argument.

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POINTS OF ERROR

(THE COURT OF APPEALS ERRED IN OVERRULING THE 32 POINTS OF ERROR AT THE TRIAL COURT LEVEL):

POINT OF ERROR

NO. 1: THE TRIAL COURT ERRED IN ADMITTING REVEREND BOND'S ST. LUKE MEDICAL RECORDS INTO EVIDENCE. (MCD EX 31; SF2374; 1864).

NO. 2: THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFF'S EX 24 AND 25 REGARDING LETTERS OF REV. MCDONALD AND REVEREND CARTWRIGHT (SF 1056, 1057, 1094, 1103, 1104, 1094).

NO. 3: THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFF'S EX 28 AND 30 REGARDING THE CONFIDENTIAL LETTER CONCERNING BOND AND HIS RELOCATABILITY. (P EX 28, 30; 1094, 1101, 1110-1114).

NO. 4: THE TRIAL COURT ERRED IN EXCLUDING THE DEPOSITION TESTIMONY OF REV. BOND'S SON INTO EVIDENCE. (539, 1188).

NO. 5: THE TRIAL COURT ERRED IN EXCLUDING DR. PULSE'S DEPOSITION TESTIMONY REGARDING THE STANDARD OF CARE INTO EVIDENCE (1154, 1179, 1204, 1207, 1213).

NO. 6: THE TRIAL COURT ERRED IN STRIKING DR. BOK'S EXPERT TESTIMONY REGARDING THE STANDARD OF CARE (T26; T30; 1378-1393; 1310, 1374; P EX 33).

NO. 7: THE TRIAL COURT ERRED IN ALLOWING NURSE JAN SIMCOX'S TESTIMONY INTO EVIDENCE (1923).

NO. 8: THE TRIAL COURT ERRED IN EXCLUDING DON LOFTIS (ADMINISTRATOR OF ST. JOSEPH'S) AS A WITNESS (875; T 13).

NO. 9: THE TRIAL COURT ERRED IN ALLOWING ATTORNEY LEXA ANN AULD'S COMMENTS INTO EVIDENCE (1856, T 139).

NO. 10: THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFF'S FIRST AND SECOND TRIAL AMENDMENTS (444, 1071).

NO. 11: THE TRIAL COURT ERRED IN REFUSING TO SUBMIT PLAINTIFF'S SECOND SUPPLEMENTAL JURY INSTRUCTIONS (2393).

NO. 12: THE TRIAL COURT ERRED IN GIVING THE IMPROPER STANDARD OF CARE FOR PSYCHIATRIC PATIENTS (314, 741-743).

NO. 13: THE TRIAL COUNT ERRED IN GIVING JURY ISSUE NO. 9 AS IT DID NOT ALLOCATE DIFFERENT

DAMAGES FOR DIFFERENT WRONGS TO THE RESPECTIVE DEFENDANTS (T 102-105, T 115; 2416).

NO. 14: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 4 AS IT DID NOT GIVE A PROPER INSTRUCTION REGARDING NEGLIGENCE PER SE (T 111; 2394, 2419).

NO. 15: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 6 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONFUSING (T 113; 2396).

NO. 16: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 11 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTORY LANGUAGE (T 121; 2397).

NO. 17: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 12 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (T 121; 2398).

NO. 18: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 13 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (T 122; 2413).

NO. 19: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 14 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (T 122; 2313).

NO. 20: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 15 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (2413).

NO. 21: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 16 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (2413).

NO. 22: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 17 AS IT COMMENTED ON THE WEIGHT

OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (2413).

NO. 23: THE TRIAL COURT ERRED IN GIVING JURY ISSUE NO. 18 AS IT COMMENTED ON THE WEIGHT OF THE EVIDENCE AND WAS CONTRARY TO STATUTE (2413).

NO. 24: THE TRIAL COURT ERRED IN LIMITING TIME TO 42 MINUTES ON FINAL ARGUMENT (SF VOL. 12, 30, 36).

NO. 25: THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT (2385).

NO. 26: THE DEFENDANTS VIOLATED THE PLAINTIFF'S MOTION IN LIMINE (516, 521, 1517, 1870).

NO. 27: THE TRIAL COURT ERRED IN DISALLOWING PLAINTIFF TO CONDUCT VOIR DIRE INTO INSURANCE INDUSTRY RELATED MATTERS.

NO. 28: THERE WAS NO EVIDENCE TO SUPPORT THE NEGATIVE ANSWER GIVEN IN ISSUE NO. 1 REGARDING THE BREACH OF CONFIDENTIALITY.

NO. 29: THERE WAS NO EVIDENCE TO SUPPORT THE NEGATIVE ANSWER TO ISSUE NO. 3 REGARDING FALSE IMPRISONMENT.

NO. 30: THERE WAS NO EVIDENCE TO SUPPORT THE NEGATIVE ANSWER TO ISSUE NO. 4 REGARDING NEGLIGENCE.

NO. 31: ALTERNATIVELY, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY FINDINGS IN SPECIAL ISSUES 1, 3, 4.

NO. 32: THE TRIAL COURT ERRED IN EXCLUDING MRS. BOND'S TESTIMONY REGARDING THE IMPACT UPON HER HUSBAND'S EMPLOYABILITY BECAUSE OF THE CONDUCT OF THE DEFENDANTS (536).

NO. 33: THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF

THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION P. 21).

NO. 34: THE APPEALS COURT ERRED IN NOT MAKING A RULING ON THE RULE 13 SANCTIONS REQUESTED OF THE COURT AGAINST THE DEFENDANTS FOR GIVING MISINFORMATION TO THE COURT REGARDING DR. BOK'S TESTIMONY AND DEPOSITION STATEMENTS.

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